three conditions. These three conditions were not minor ones. They involved a great deal of work and expenditure and it is utterly difficult to comprehend that such important matters would simply be left out of a formal agreement of purchase and sale involving a large and expensive piece of land.

As I said earlier I accepted the evidence adduced on behalf of the plaintiffs. The defendant appeared to have taken the three conditions lightly and as Mr. James Ponniah submitted she might well have formed the impression that the conditions would no longer be applicable. It seems to me very likely that the defendant deliberately kept back this information from the plaintiffs so as not to jeopardise her plan to sell the land at the price of $700,000.00 to the plaintiffs and leaving the plaintiffs later on to face the problem themselves. Now the defendant was trying to bring in oral evidence in an attempt to vary the terms of the written agreement which in my view is fairly complete and exhaustive in its terms. In the circumstances therefore I was of the view that under sections 91 and 92 of the Evidence Act such oral evidence was inadmissible.

As I said in giving my decision on January 9 1982 there was no undue delay by the plaintiffs in trying to comply with the agreement. They were doing all they could reasonably do in the circumstances and I held that the defendant had acted unreasonably and wrongfully in terminating the agreement. The plaintiffs on their part had paid $300,000.00 as part payment towards the purchase price and they were willing to pay the balance. As for getting the plans approved they were doing their best in the circumstances. In the event I found for the plaintiffs. I was of the view that this was a proper case to order specific performance of the agreement and I ordered accordingly. I also held that the plaintiffs were entitled to their claim for damages arising out of the wrongful termination of the agreement. Their development project had been held back for several years and taking this into account I ordered $50,000.00 as damages.

After I had announced my decision Mr. Soo Lim Pang for the plaintiffs asked if I would also allow the plaintiffs' claim for the sum of $48,302.00. I said no because these were expenses which were to be borne by the plaintiffs themselves under clause 9 of the agreement. The plaintiffs would have been entitled to this sum but only if I had not ordered specific performance and had given judgment in the alternative claim for the refund of the sum of $300,000.00.

The defendant's counterclaim was dismissed. Under clause 10 of the agreement all quit rents and assessments incurred before the date of completion of the sale were required to be paid by the defendant. As for the claim for the survey fees the receipt for the sum of $5,000.00 issued by a private surveyor to the defendant was not for fees but was for payment by way of deposit. Under clause 9 of the agreement the plaintiffs were required to pay to the defendant on the date of completion of the sale all deposits paid by her to the private surveyor. The defendant is certainly entitled to this sum but will receive it only on the date of completion of the sale.

Order accordingly.

Solicitors: *Stanley Ponniah, Ng & Soo; Chan & Chia.*

PUBLIC PROSECUTOR v. SAUBIN BEATRICE

[O.C.J. (B.T.H. Lee J.) July 19, 1982]
[Penang – Criminal Trial No. 2 of 1980]

Criminal Law and Procedure – Charge of trafficking in heroin – Custody and control of heroin – Presumption of possession – Presumption of trafficking – Presumptions not rebutted – Balance of probability – Sentence.

Dangerous Drugs – Charge of trafficking heroin – Presumption of possession – Presumption of trafficking.

In this case a party of Customs Officers conducted an investigation into a drug smuggling case. The accused was seen leaving her hotel and carrying a green suit case and a sling bag. She boarded a taxi and was driving towards Bayan Lepas Airport. At the airport the accused was seen wheeling the green suit case to the check-in counter. The accused was detained and brought to the Customs Passengers Examination Hall. The suit case was examined in the presence of the accused and 22 plastic packages suspected to be drugs were found concealed within the walls of the suitcase. The Chemist report confirmed that the 22 plastic bags contained 534 grammes of heroin. The accused was questioned by a Customs Officer and subsequently a cautioned statement was recorded from her. In her cautioned statement and in her evidence the accused claimed that the bag was given to her by a male Chinese whom she met and with whom she had fallen in love.

Held: (1) when the accused was stopped by the Customs Officers she had in her custody or under her control heroin weighing 534 grammes. In the circumstances the presumption of possession under section 37(d) and of trafficking under section 37(da) of the Dangerous Drugs Ordinance arose;

(2) on the evidence and on a balance of probabilities the presumptions had not been rebutted by the accused;

(3) the relationship between drugs and violent crimes is one of the most serious issues facing our criminal law. In the condition now prevailing severe sentences are necessary. There is too much of this sort of crime being committed in this country and the necessity for severe measures for its repression are matters on which the Legislature has found it necessary to enact special laws. The accused should therefore be sentenced to death.

Cases referred to:

(1) *Reg.* v. *Reginald Francis Naylor* 23 Cr. App. R. 177, 179.
(2) *Reg.* v. *Warner* [1969] 2 A.C. 256.
(3) *Public Prosecutor* v. *Ang Boon Foo* [1981] 1 M.L.J. 40.
(4) *Neo Koon Cheo* v. *Reg.* [1959] M.L.J. 47.
(5) *Loh Hock Seng* v. *Public Prosecutor* [1980] 2 M.L.J. 13.
(6) *Dhanvantrai Balwantrai Desai* v. *State of Maharashtra* AIR 1964 S.C. 575.

[*Editorial Note:* On appeal to the Federal Court, the sentence was altered to imprisonment for life. No grounds of judgment were given]

CIVIL SUIT.

Azmi bin Ahmad (Deputy Public Prosecutor) for the Public Prosecutor.

K. Kumaraendran (*V. Sethambaran* with him) for the accused.

Cur. Adv. Vult.

B.T.H. Lee J.: The Accused, Saubin Beatrice, aged 22 years of age was charged in the High Court, Penang under section 39B which falls within Part VI of the Dangerous Drugs Act, 1952 (Revised 1980).

The Charge reads:–

"That you on January 27, 1980 at about 2.15 p.m. at Bayan Lepas International Airport, in the District of Balik Pulau, in the State of Penang, did on your behalf traffic in dangerous drugs, to wit, heroin weighing 534 grammes, and you have thereby committed an offence under section 39B (1)(a) of the Dangerous Drugs Ordinance No. 30 of 1953, punishable under sub-section 39B (2) of the Ordinance."

The case for the prosecution as sought to be established by the evidence may be briefly narrated.

On the January 16, 1980 acting on information a party of Customs Preventive officers of Pik (P) 1291, 1650, 1173, 1904, 934 and 58 under the charge of Penguasa Kastam Pencegah, Encik Thomas Mathews conducted an investigation into a drug smuggling case. This operation which started on January 16, 1980 led to the arrest of the Accused on January 27, 1980.

On January 27, 1980 at about 1.30 p.m. Pik (P) 1173, 1904 and 1291 saw the Accused leaving the E & O Hotel, Penang. The Accused was seen carrying a green suit case and a sling bag. She boarded a taxi bearing registration No. H 8923 and was driving towards Bayan Lepas Airport followed by Pik (P) 1904 on his motor-cycle.

Pik (P) 1173 and Pik (P) 1291 subsequently confirmed from the Hotel Register that the Accused had checked out of the Hotel at 1.30 p.m. At about 1.35 p.m., Pik (P) 1173 telephoned the Bayan Lepas Airport and told Pik (P) 1650 that the Accused was on her way to the Airport.

At about 1.50 p.m., Pik (P) 934 who was waiting at the Airport informed Pik (P) 1650 that the taxi bearing registration H 8923 had arrived. The Accused was thereupon seen wheeling a green suit case towards the 'Check in Counter'.

At the said counter, Pik (P) 1650 and Pik (P) 984 approached the Accused and declared their office.

The Accused was then directed towards the Customs Passengers examination hall. At about 2.15 p.m. Pik (P) 1650 handed the Accused together with the suit case to Encik Thomas Mathews for further investigation. Encik Thomas Mathews subsequently asked the Accused if she had anything to declare upon which she replied that she had some of her personal belonging and clothing in the suit case. Pik (P) 1650 was then directed by Encik Thomas Mathews to examine the suit case in the presence of the Accused person. The other Customs officers present during the examination were Pik (P) 1291, 1173, 1904 and 306.

The examination of the suit case revealed 22 plastic packages containing light brown powder suspected to be drugs and concealed within the walls of the suit case. The Accused was then asked by Encik Thomas Mathews as to the content of the plastic bags and she replied they contained 'heroin'.

At about 4.00 p.m. on the same day the Accused together with the suit case and the 22 packages of suspected drugs were taken back to

the Customs Preventive Office, Penang and were subsequently handed over to Penguasa Kastam, Encik Mohd. Dhajudeen for further action. A cautioned statement was recorded by Encik Mohd. Dhajudeen from Accused person at about 6.45 p.m.

At about 11.10 p.m. on the same day a Police Report No. 252/80 was lodged at the Lembah Pantai Police Station, Penang.

On the January 29, 1980 at about 12.30 p.m. Encik Dhajudeen handed over a sealed wooden box containing 22 plastic packets of suspected drugs to the Jabatan Kimia Penang for analysis.

The wooden box was sealed with Customs seal "Kastam & Eksais Di Raja Malaysia, 91".

On the February 7, 1980 at about 10.40 a.m. Penguasa Kastam, Encik Dhajudeen received the Chemist Report Kimia 13 Report No. (Pg)1490/80 dated February 6, 1980.

The Chemist Report confirmed that the 22 plastic packets contain 534 grammes of heroin.

Certain Parts Of The Alleged First Cautioned Statement Be Expunged From Record

It will be convenient first to deal with the point raised by Counsel for the Defence during the trial.

I do not think it is necessary to go into the particulars of evidence in respect of certain matters touching the alleged first voluntary statement made by the Accused to Encik Thomas Mathews, the Superintendent of Customs (P.W.4) since the matter is now academic. The Court has made a Ruling that Counsel for Defence in his submissions had disclosed merit and accordingly certain parts of the evidence of P.W.1 and P.W.3 are hereby expunged from the Record.

The parts to be expunged are:–

"It was after some time of questioning that she answered it was heroin"

and further down:–

Q: When Mathews asked Accused, she kept quiet.

A: When he asked two or three times she said "Of course everybody knows it is heroin". After that Mathews repeated the caution to her.

and when P.W.3 was cross-examined:–

Q: When the drugs were found, did Thomas Mathews question her?

A: Yes, he questioned her about 5 minutes.

Q: But the Accused remained silent.

A: I heard her say in English "Who doesn't know what heroin is".

Furthermore, Mat Ali bin Abdul Razak (P.W.1) in cross-examination by the Defence:–

Q: The caution was not read out to her.

A: Thomas Mathews also told the accused she didn't say anything she did not have to.

Q: Accused said "I am not saying anything".

A: After the caution was said to her the accused did not say anything. Thomas Mathews said what you said may be given as evidence in Court.

No statement was taken by me. I did not make a police report. As far as I know no other police officers made any report.

Endorsing and fully maintaining the integrity of the principle asserted by Lord Hewart C.J. in the case of *Reginald Francis Naylor*[1], I would refer to his speech at page 179:–

"Taking the view we do, we do not think it necessary to deal in detail with the facts of the case. The appellant gave evidence and denied his guilt. The real point is to be found in the criticism which has been made of the summing-up. The appellant was asked, in the usual formula, in the court below whether he had anything to say, and that formula was read out to him. The important words are: "Do you wish to say anything in answer to the charge? You are not obliged to say anything unless you desire to do so, but whatever you say will be taken down in writing, and may be given in evidence upon your trial," whereupon the accused said: "I don't wish to say anything except that I am innocent." In referring to those words, the Recorder, in his summing up, continued as follows: "Now you would imagine a purely innocent young man accused of housebreaking and having these words put to him "Do you wish to say anything? – Surely if he is an innocent man one would think he would give some explanation of where he was, and what he was doing at the particular time, and would make his defence then and there. But he says nothing." Then the Recorder added: "I can understand the answer to that made by counsel, and I have heard the same answer on many other occasions. It is all blamed on the solicitor. His solicitor was there and advised him to say nothing. Well, the solicitor had to get his client off somehow, and it is very likely his solicitor did advise him to say nothing. But supposing your solicitor did advise you to say nothing when a charge of felony or murder is against you, you would surely say the best thing to do is to say

"I am not guilty" and explain why". Then follow these remarkable words: "Of course, what lurks in the background of this sort of hanging back, and not disclosing his defence is this, that he gives the prosecution and the police no time to inquire into any statement he may make, so that it might be possible to show that these statements are not true. That is the real reason why many men don't make statements when they are first called upon to do so, why they don't wish to do."

We are of opinion that that was a misdirection. The case is really *a fortiori* upon the case of *Whitehead,* 21 Cr. App. R.23; [1929] 1 K.B. 99, where it was held that it is not corroboration of incriminating evidence that the accused did not deny the charge or was silent about it. But it is well to add something further. When one looks at the words of the formula which must be deliberately framed, it is quite obvious that they were intended to convey and do convey to the prisoner the belief that he is not obliged to say anything unless he desires to do so. Now if those words are really to be construed in this sense, that, having heard them, an accused person remains silent at his peril and may find it a strong point against him at his trial that he did not say anything after being told he was not obliged to say anything, one can only think that this form of words is most unfortunate and misleading. We think that these words mean what they say and that an accused person is quite entitled to say: "I do not wish to say anything except that I am innocent." The matter becomes even stronger when one reflects that what was done here was done on the advice of an able and experienced solicitor. It would be strange if a point could properly be made against an accused person if, acting on the advice of his solicitor and following the very words of that which is said to him, he remains silent, that he did not then and there disclose his defence.

and at page 181:–

"Counsel for the Crown has urged everything that can be urged, but we have come to the conclusion that, after this summing-up, this conviction is unsatisfactory and cannot stand. We think that this appeal ought to be allowed and this conviction quashed."

SUIT CASE

Evidence was given by the Superintendent of Customs – Mohd. Dhajudeen bin Shatul Hamid (P.W.7). He said:–

"On further examination of the bag I found the bag had secret compartments in both the top and bottom layers of the bag. In the top layer of the bag there were 11 plastic packets filled with a light brown substance. In the bottom layer of the bag there were another 11 plastic packets filled with a light brown substance. I removed these packets and weighed them. *The weight was 5 kilos.* (Emphasis added)

I would now refer to the cautioned statement (Exhibit P9) made by Accused to Mohd. Dhajudeen bin Shatul Hamid (P.W.7) with reference to the suit case.

Q: Do you remember from where you bought the bag?

A: It was not from a shop. In the beginning I was staying at Swiss Hotel. I met a Chinese male, to whom I asked for advice about the purchasing of a cheap bag. He asked me what kind of bag I wanted, to which I told him I needed a nice looking bag, which was not too expensive, but also of a good quality. I also told the Chinese male that I don't mind buying a second-hand bag. So yesterday morning at about 11 a.m. the Chinese male brought this bag to me at one of the side street off Penang, where he asked me to wait. *I collected the bag and took it to my hotel.*

(Emphasis added)

In cross-examination by the Prosecution:–

"You said to the Customs Officer "I collected the bag and took it to my hotel."

I think there is a misunderstanding – the Customs officers were mistaken when he said I collected the bag and took it to my hotel."

and to further cross-examination:–

Q: Did you *carry the bag from the table* or *bed* to the floor?

A: I cannot remember carrying the bag.

Q: When you opened the bag, did you not notice the sides were *bulky?*

A: I did not notice anything.

and to the last question:–

Q: In your process of carrying the bag, did you notice it is heavier?

A: I did *not find* the *weight unusual.*

Weight of Drugs in Suit Case

In his evidence, Superintendent of Customs, Mohamed Dhajudeen bin Shatul Hamid (P.W.7) said:–

"In the presence of the Accused and the Superintendent of Customs, P.W.4, I checked the green suit case. In it were some personal clothings which I removed and kept in box. On further examination of the bag I found the bag had secret compartments in both the top and bottom layers of the bag.

In the top layer of the bag there were 11 pastic packets filled with a light brown substance. In the bottom layer of the bag there were another 11 plastic packets filled with a light brown substance. I removed these packets and weighed them. *The weight was 5 kilos."* (Emphasis added)

According to Metric Conversion Table:

1 Kilo	=	2.20 pound
5 Kilos	=	11 pounds

and

1 kilo	=	1.65 kati
5 kilos	=	8.25 katis

It is convenient to refer to the evidence of the Chemist – *Sin Hock Lye* (P.W.2).

He said:–

"At 12.30 p.m. on the January 29, 1980 I received from Mohd. Dhajudeen a cardboard box containing a total of 22 plastic bags in which were *5211 grammes* of a light brown substance containing 534 grammes of heroin." [See page 9E of Record]

According to the Metric Conversion Table:

605 grammes	=	1 kati
5211 grammes	=	8.8 katis

Having watched and listened to Accused giving her evidence from the Dock, I find that she showed a most unfortunate tendency to avoid giving either a direct or a frank answer on any point on which she thought her personal interest was involved. Of such evidence as she did give I merely record that such evidence of probabilities her answers were singularly unconvincing and she did not impress me as reliable and I cannot accept the evidence on the following issues, i.e.:

Q: Did you carry the bag from the table or bed to the floor?

A: I cannot remember carrying the bag.

Q: In your process of carrying the bag, did you notice it is heavier?

A: I did not find the weight unusual.

bearing in mind the weight of the unrefined heroin is about 8.25 katis.

Moreover in her cautioned statement (Ex. P9) she said:–

"So, yesterday morning at about 11 a.m. the Chinese male brought this bag to me at one of the side street, off Penang where he asked me to wait. *I collected the bag and took it to my hotel.*" (Emphasis added)

Although in cross-examination she said "I think there is a misunderstanding – the Customs officers was mistaken when he said I collected the bag and took it to my hotel."

The cautioned statement was also read over to her and Accused confirmed it to be true and correct and she also signed the cautioned statement.

It is however relevant to observe that the two sentences quoted from the cautioned statement and the Accused's reply in cross-examination are not couched in technical, scientific or legal jargon or high fluent English, but in simple English.

Eddy Tan

I now turn to deal with the so-called Eddy Tan.

It is significant that the person called Eddy Tan was not even mentioned by Accused at the stage when the cautioned statement (Ex. P9) was recorded by Mohd. Dhajudeen bin Shatul Hamid (P.W.7) on January 27, 1980 at about 6.45 p.m., some two years ago.

The cautioned statement merely recorded what the Accused told the Customs officer. It reads:–

Q: Can you remember from where you bought the bag?

A: It was not from a shop. In the beginning I was staying at Swiss Hotel. I met a *Chinese male* to whom I asked for advice about the purchasing of a cheap bag. He asked me what kind of bag I wanted to which I told him I needed a nice looking bag which was not too expensive but also one of a good quality. I also told the *Chinese male* that I don't mind buying a second-hand bag. So yesterday morning at about 11 a.m. the *Chinese male* brought this bag to me at one of the side street, off Penang, where he asked me to wait. I collected the bag and took it to my hotel.
(Emphasis added)

It is significant to note that the Defence on the 6th day of May, 1982 before the lunch break made the following observation:–

"In regard to the cautioned statement the I.O. did not check up for the details she (Accused) gave in cautioned statement. Where was the Chinese man, any attempts to trace that man. What is the I.O. doing. He is more or less a tamby. He should have investigated."

On June 16, 1982 the day before oral judgment of the court was delivered i.e. on June 17, 1982, Irabathom (D.W.2), the Process Server attached to the D.S.P. Court Penang said in evidence sometime in May, 1982, a subpoena was served on Eddy Tan Kim Soo at Swiss Hotel, Penang. He was unable to serve the summons on

Eddy Tan and he added another Process Server – Robert Lim also attempted to serve the summons on Eddy Tan but he was unsuccessful.

In her evidence given in examination in chief by her Counsel, Accused was asked:–

Q: Were you responsible for the drugs in the bag?

A: No. I was used by someone else.

Q: In your statement you mentioned a Chinese male – why did you not mention the name?

A: I do not believe that the man who loved me could have made use of me.

The observation by Counsel has prompted the court to have recourse to a rejoinder.

I cannot help remarking and it is perhaps worth observing that Accused has as she alleged the knowledge of the identity of the so-called Chinese male, but for reasons best known to her, she was reluctant to pass on the information to the officers of the Customs Department.

I repeat what she said in evidence:

"I do not believe that the man who loved me could have made use of me."

That being so the blame cannot be laid at the door of the Customs Department. Accused has through her Counsel sought to shed some of her own responsibility by attributing the blame to the Customs Department.

In my view the blame if at all must be laid fairly and squarely upon the shoulders of the Accused, whose behaviour does her no credit, assuming that Eddy Tan existed, which the court doubts.

Accused must have known from her Counsel or the prison officers sometime between January 1980 when she was detained by the police and before her trial on May 4, 1982, a period approximately two years and four months – that if she contravened section 39B (1)(a) of the Dangerous Drugs Act, 1952 she shall be guilty of an offence against the Act and shall be punished on conviction with death or imprisonment for life. Would she in the circumstances still shield the culprit and take the rap. Very unlikely.

With respect I am inclined to agree with the Prosecution on a balance of probabilities that the "elusive Eddy Tan" is a fictitious character.

I am also inclined to the view upon a balance of probabilities that the service of a subpoena on Eddy Tan Kim Soo at Swiss Hotel, Penang was a mere colourable device to show that Eddy Tan existed.

Thomas Mathews, Superintendent of Customs (P.W.4) – not an Investigation Officer

Q: You were acting as an Investigation Officer?

A: No. I am not.

I maintain that I was not Investigation Officer.

In re-examination, he said:

"I was a raiding officer in this case and not the Investigating Officer. I was head of a raiding party organised for this case. My duty was essentially for the purpose of raiding. I could not perform the duties of the Investigating Officer because I was a raiding officer.

As far as the Customs Department is concerned, the duty of raiding and investigation are performed by different officers.

Submissions by Defence Counsel.

In regard to the cautioned statement, the Investigating Officer did not check up from the details she gave in the cautioned statement. Where is the Chinese man, any attempts to trace that man. What is the Investigating Office doing? He is more or less a tamby. He should investigate.

(Submit – Her cautioned statement must be accepted)

Accused's knowledge of English

Mat Ali bin Abdul Razak (P.W.1) gave evidence in respect of Accused's knowledge of English:–

"The Accused did reply to questions put to Accused knowledge of English is "so-so". He explained the caution and Accused understood."

"Thomas Mathews also told the Accused she didn't say anything she did not have to."

Accused said "I am not saying anything".

Tajudin bin Mohd. Nor (P.W.3) was also cross-examined:–

Q: Accused spoken English is not good.

A: She can speak English but her accent is Fench.

Thomas Mathews (P.W.4) was asked:–

Q: Previous to this what language did you speak to Accused?

A: The conversation was in English. I feel that Accused person understood English well as she was able to reply off and on in English.

Q: Put – Her replies were short replies.

A: Yes.

Q: You have not ascertained whether she understood English.

A: I feel she understood clearly. Her answers were short sentences.

Although Accused's knowledge of the English language may be of a limited order, her replies to P.W.4's questions goes to show that Accused understands English.

In thus stating the facts, there is nothing in the answers given by the Accused as have been referred to above which leads the Court to think she did not understand the questions put to her in English.

Absolute Offence

When Accused was stopped by the Customs Officers she had in her custody or under her control heroin weighing 534 grammes.

It was contended by the Prosecution, rightly in my view that section 37 (da) of the Dangerous Drugs Act imposed an absolute prohibition and that unauthorised possession without guilty knowledge was sufficient to constitute the offence.

In my judgment before one comes to consider the necessity for *mens rea* or, as it is sometimes said whether the section imposed an absolute liability, it is of course necessary to consider possession itself.

One looks at the mischief aimed at by the Act and one considers the sort of provision it is, in particular whether it is a public welfare provision and one also examines the precise language used.

Drugs are a matter of grave concern to everyone, that it was the intention of Parliament as evinced by the legislation to tighten up more and more the control of drugs and that if one considered the mischief aimed at alone there was every reason for treating a provision such as this as a provision imposing absolute liability. It is significant the fact that the word "knowingly" does not appear before "possession".

In *Reg.* v. *Warner*[2] it was held

(1) (Lord Reid dissenting) that the Act of 1964 came within the class of Acts in which the offence prescribed therein was absolute; that the Act forbade possession of certain scheduled drugs, and whether an accused possessed them with an innocent or guilty mind or for a laudable or improper purpose was immaterial since he was not allowed to possess them and if he did posses them without lawful authority he was guilty of an offence under the Act (pp. 295G, 296BO- D, 301C-E, 306F – 307A, 312E).

Per Lord Pearce. It would, I think be an improvement of a difficult position if Parliament were to enact that when a person has ownership or physical possession of drugs he shall be guilty unless he proves on a balance of probabilities that he was unaware of their nature or had reasonable excuse for their possession (p. 307B).

Per Lord Wilberforce. No separate problem of the mental elements in criminal offences arises; the statute contains its own solution as to the kind of control penalised by the Act (p. 312F-G).

Presumptions

Reference may be made to section 37 (d) and (da) of the Dangerous Drugs Act.

Presumption of knowledge

(d) any person who is found to have had in his *custody* or under his *control* anything whatsoever containing any dangerous drug shall, until the contrary is proved, be *deemed to have been in possession* of such drug, and shall, until the contrary is proved, be deemed to have known the nature of such drug. [See *Public Prosecutor* v. *Ang Boon Foo*[3] and *Neo Koon Cheo* v. *Reg*[4]]

All that the accused had to do was to establish the probability of that which she was required to prove. This the accused failed to do.

Presumption of trafficking

(da) any person who is found in possession of *100 grammes* of heroin or ... or more in weight ... shall be presumed, until the contrary is proved, to be *trafficking* in the said drug.

Having seen the witnesses and heard their evidence, I find that the Accused failed to rebut the presumption under section 37(d) nor had she rebutted the presumption under section 37(da) above on a balance of probabilities.

In this case the amount of heroin involved is substantial i.e. 534 grammes.

Section 37 (da) says if a person is in possession of 100 grammes he is presumed to be trafficking. Sentence for this offence is life imprisonment or death. In the instant case it is five (5) times over 100 grammes.

The Dangerous Drugs Act is dealing with the very important matter, particularly today of dangerous drugs. I certainly take judicial notice of the fact that drugs are a great danger today, and legislation has been tightening up the control of drugs in all its aspects.

On sentence I need only refer to the case of *Loh Hock Seng & Anor* v. *Public Prosecutor*[5] where His Lordship Raja Azlan Shah, the Chief Justice said:–

"We would like to take this occasion to reaffirm expressly unequivocably and unanimously that where the case justifies it, judges should not develop a phobia against inflicting the death penalty. In our view, the prescribing of a maximum penalty in respect of an offence not only marks the limits of the court's discretionary power as to sentence, it also ordinarily prescribes what the penalty should be in the more serious type of cases falling within the relevant class of the offence meriting the maximum punishment prescribed.

We are of the view that in the circumstances ... the imposition of a term of imprisonment for life is wholly inadequate as it does not reflect the gravity of the offence and the circumstances of the case against him, his record of previous convictions, the public interest involved in respect of crimes of this nature and a sufficient factor of deterrence to others of his ilk.

We accordingly allow the Public Prosecutor's appeal against sentence in respect of the appellant, set aside the term of imprisonment for life and whipping imposed on him and substitute therefor the sentence of death."

Conclusion

It is surely putting a premium on the Court's credulity to ask the court to believe that the suit case was sold in Penang Bazaar with heroin worth about $1.2 million.

I find it myself difficult to believe that Accused took no interest in what was contained in the secret compartments. Nor do I believe that Accused when packing before departure from Penang failed to notice that the concealed sides were bulky.

Accused was caught red-handed with the packets of unrefined heroin in her suit case weighing 5 kilos i.e. about 8.25 katis or 11 pounds, which on analysis the Chemist found to contain 534 grammes of pure heroin.

In Kuala Lumpur sometime towards the end of May this year I heard a case of possession of drugs. The amount was 656 grammes. I will read the evidence of the ASP Balbir Singh – Anti-Narcotic Branch who gave expert evidence in Federal Territory Criminal Trial No. 6/81 at page 10 of the Record.

He said he had been in the Narcotic Branch for 7 years. Before sending the 4 packets he weighed them and the weight was 1741 grammes. On analysis by the Government Chemist the four packets were found to contain 656.9 grammes of pure heroin.

The popular mode of use is called "Chasing the Dragon". The amount of heroin is placed on a cigarette foil and it is lighted from the bottom with a match stick and when the heroin is heated up it emits fumes which are inhaled by means of a straw by the user or sucked. Normally the heroin is sold in straws. The average weight of the heroin filled with heroin is 062 grammes. The straws are usually in 1" straws or 1½" straws. 1" straw cost $10. 1½" straw costs $20.

Q: How many straws will find 1,741 grammes of heroin?

A: 108942 straws. These are 1" straw containing an average of .062 grammes. Basing on $10/- per straw, it would be $1,079,420. One gramme can be converted into 212 shots.

Q: What is the number of shots that can be obtained from 1,741 grammes?

A: 369092 shots.

In the streets the traffickers do not sell refined heroin. The Accused would have sold the amount in its unrefined state, and would have fetched the pushers and pedlars on the street when retailing to the drug pushers something of the order of $1.5 million if Accused was not caught.

The relationship between drugs and violent crimes is one of the most serious issues facing our criminal justice system.

I would say that there is too much of this sort of crime being committed in this country and the

necessity for severe measures for its repression are matters which the Legislature has found it neccessary to enact special laws to combat it.

Those who import, export, buy, sell, receive, supply, distribute, keep, transport or distribute any dangerous drug merit exemplary punishment for the conduct is conducive to crime in others. In the condition now prevailing more severe sentences are necessary.

As I have said the heroin is worth $1.2 million in the streets.

It must be made known to all persons who contemplate this sort of crime that the punishment if they are caught is invariably severe. It must be shown conclusively that it does not pay.

Upon the evidence before this court I am of the opinion and I so hold on a balance of probabilities that the presumptions had not been rebutted by the Accused bearing in mind that the words *"shall* until the contrary is proved" and not *"may* until the contrary is proved" appearing in both sections 37 (d) and section 37 (da). [See *Dhanvantrai Balwantrai Desai* v. *State of Maharashtra*(6)]

I find the Accused guilty of the offence with which she is charged. Accordingly I sentence her to death.

Accused sentenced accordingly.

Solicitors: *Kumar, Chan & Chia*

ORIENTAL RUBBER AND OIL PALMS SDN. BHD. v. PEMUNGUT HASIL TANAH, KUANTAN

[O.C.J. (George J.) July 29, 1982]
[Kuantan – Originating Motion No. 21 of 1981]

Administrative Law – Certiorari – Decision and Award of Compensation by Collector of Land Revenue – Land Acquisition – Whether certiorari available – Delay of six years after issue of notification before holding inquiry – Notice exhausted and of no effect – Land Acquisition Act 1960, ss. 4, 8, 10 and 68 – Federal Constitution, Article 13.

Land Law – Land Acquisition – Delay of six years after issue of notification before holding of inquiry – Notice exhausted and of no effect – Land Acquisition Act 1960, ss. 4, 8, 10 and 68 – Federal Constitution, Article 13.

In this case the Government of the State of Pahang declared its intention to acquire the lands by publishing the declarations under section 8 in 1974 and 1975. The enquiry under section 10 of the Act was only commenced on December 16, 1980 and completed on January 7 1981. The offer of compensation was made on April 8, 1981. The Collector made his award based on his opinion of the market value of the lands as at the date of the section 8 notification. The applicants applied for an order of certiorari to quash the decision and award of compensation of the Collector of Land Revenue on the ground that the whole process of acquisition had become a nullity and when he finally conducted the section 10 enquiry the Collector had ceased to have jurisdiction. The learned Legal Adviser raised a preliminary objection that the court had no jurisdiction to grant an order of certiorari in respect of an award of compensation made by a Collector in a land acquisition proceeding. He also argued that there were no merits in the application.

Held: (1) the modern trend has been to extend the scope of certiorari and impose it as a general remedy for the control of decisions by the administration affecting the rights of the subject. The ratio for this apparent extension of application of the power of judicial review is that whenever there is a power to determine questions affecting the rights of the subject there is a duty to act judicially;

(2) the courts not only have the power but will readily use such power to quash administrative decisions which were arrived at without due observance of the requirements of the statute under which the decision was purported to have been arrived at or which was arrived at without due observance of the principles of natural justice if it can be shown that the effect of the decision is in some real sense against good conscience:

(3) in this case the delay of almost six years between the section 8 notification and the holding of the section 10 enquiry caused the section 8 notice to be exhausted and of no effect, for the valuation of the land made in 1981 based on the date of the section 8 notification would not provide adequate compensation to the applicants. Accordingly the award of the Collector should be quashed.

Cases referred to:

(1) *R.* v. *Legislative Committee of the Church Assembly* [1928] 1 K.B. 411, 415.
(2) *R.* v. *Electricity Commissioners* [1924] 1 K.B. 171, 204-205.
(3) *Nakkuda Ali* v. *M.F. de S. Jayaratne* [1951] A.C. 66, 78.
(4) *Ridge* v. *Baldwin* [1964] A.C. 40.
(5) *Ketua Pengarah Kastam* v. *Ho Kwan Seng* [1977] 2 M.L.J. 152, 154.
(6) *State* v. *Kalicharan* A.I.R. 1965, Cal. 638.
(7) *Ezra* v. *Secretary of State for India* 32 I.A. 93.
(8) *Anisminic Ltd.* v. *Foreign Compensation Commission* [1969] 2 A.C. 147.
(9) *South East Asia Firebricks Sdn. Bhd.* v. *Non-Metallic Mineral Products Manufacturing Employees Union & Ors.* [1980] 2 M.L.J. 165.
(10) *Simpson's Motor Sales (London) Ltd.* v. *Hendon Corpn.* [1964] A.C. 1088, 1126.
(11) *Doongarsee & Sons* v. *State of Gujarat* A.I.R. 1971 Guj. 46, 54.
(12) *Venkatamma* v. *C.I. Trust Board* A.I.R. 1972 S.C. 2683.